Case No. 83-1519

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF FLORIDA,

Petitioner,

vs.

RAYMOND LEE DRAKE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 N. Broadway Avenue
Bartow, Florida 33830
(813)533-1184 or 533-0931

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I.

Whether the decision of the lower court impermissibly and overbroadly extends the custody definition of Miranda v. Arizona, 384 U.S. 463 (1966), beyond that recognized by this Honorable Court in Oregon v. Mathiason, 429 U.S. 492 (1977), and its progeny.

II.

Whether the lower court erred by reversing the trial court in Drake, based on an application Miranda v. Arizona, 384 U.S. 463 (Fla.1966), by way of Edwards v. Arizona, 451 U.S. 457 (1981); where Edwards has been held by this Honorable Court to be clearly not applicable retroactively.

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STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case with the following additions:

The Supreme Court of Florida has reversed this case twice. In the first decision, the court reversed because of the improper admission of collateral crimes evidence. Drake v. State, 400 So.2d 1217 (Fla.1981).(RA1-4)[1/] The court also noted the existence of a "technical violation of the Miranda rule" Ibid. at 1220. This case was reversed the second time on the Miranda violation, which is the issue Petitioner is now asking this Court to review, and on the admission of collateral crimes evidence, an error which reoccurred in the second trial. Drake v. State, 441 So.2d 1079 (Fla.1983). (PA1-16)

On February 22, 1984, the Supreme Court of Florida issued its mandate requiring a third new trial of this case. (RA5) The retrial was scheduled for April 10, 1984. (RA6)

REASONS FOR DENYING THE WRIT

(1) The Issue Presented Is Moot.

On February 22, 1984, the Supreme Court of Florida issued its mandate requiring a new trial in this case. (RA5) The circuit court for Pinellas County, Florida, scheduled a retrial of this cause for April 10, 1984. (RA6) Respondent proceeded to trial on that date, and the trial is in progress at this time of this writing. The requirements of the Supreme Court of Florida's judgment have been met and a reversal of that judgment at this time will have no affect on the parties.

(2) The Judgment Is Based On Adequate And Independent State Grounds.

The decision of the Supreme Court of Florida in this case is based upon two independent grounds. Drake v. State, 441

[1/] References to the appendix to this brief will be designated "RA". References to the Petitioner's appendix will be designated "PA".

So.2d 1079 (Fla.1983). (PA1-16) One is premised on the application of Oregon v. Mathiason, 429 U.S. 492 (1977) and of Edwards v. Arizona, 451 U.S. 457 (1981), and is the Petitioner's basis for review. (PA1-12) The second is based upon the application of a state rule of evidence regarding the admissibility of collateral crimes evidence. (PA12-14) Drake v. State, 441 So.2d 1079 (Fla.1983). Since the second independent ground is founded upon state law and is adequate to support the Florida Court's decision to grant Respondent a new trial, this Court should not exercise its jurisdiction to review this case. Wilson v. Loew's Inc., 355 U.S. 597 (1958); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

On the first appeal of this case, the Supreme Court of Florida reversed Respondent's convictions for a new trial because collateral crimes evidence was improperly admitted. Drake v. State, 400 So.2d 1217 (Fla.1981). (RA1-4) The court rejected the prosecutor's motive theory as a basis for relevency. Ibid. at 1219. At the second trial, the prosecutor used the same motive theory to support evidence of collateral crimes (Respondent's parole status at the time of the alleged crime). This issue was again raised in the Supreme Court of Florida as a basis for reversing the judgment. The Florida Court reaffirmed its earlier opinion and, in part, founded its decision to reverse the case a second time on that basis. Drake v. State, 441 So.2d 1079,1082 (Fla.1983). (PA1-16) The question is one of state evidence law. A review of the Florida Court's two decisions regarding the matter, Drake v. State, 400 So.2d 1217 (Fla.1981); Drake v. State, 441 So.2d 1079 (Fla.1983), make that court's position clear--error justifying a reversal of the case for a new trial occurred because of improperly admitted evidence. The Florida Court's judgment ordering a new trial would remain even if this Court granted certiorari and ruled in Petitioner's favor on the federal issue. Since the state law question is an adequate independent basis for the Florida Court's judgment, this Court's decision on the federal question would be

tantamount to an advisory opinion. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562,566 (1977).

(3) The Lower Court Did Not Misapply The Custody Requirement Established In Miranda.

The Supreme Court of Florida has not circumvented the custody requirement of Miranda v. Arizona, 384 U.S. 436 (1966), as Petitioner suggests. (Petition for Writ of Certiorari, at p.17) Instead, that court acknowledged the custody requirement, citing this Court's decision in Oregon v. Mathiason, 429 U.S. 492 (1977), applied the objective test for determining custody and concluded that the facts demonstrated that Respondent was in custody for purposes of Miranda. Drake v. State, 441 So.2d 1079,1081-1082 (Fla.1983). (PA5-9) The Florida Court correctly followed the mandate of this Court regarding the determination of custody.[2/] Beheler v. California, __U.S.__, 77 L.Ed.2d 1275 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977).

This Court defined "custodial interrogation" as

> ...questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Miranda v. Arizona, 384 U.S. 436,444 (1966). The Supreme Court of Florida applied that standard and concluded that,

> ...under the circumstances as they existed at the time Drake submitted to the taped questioning, a reasonable person would have believed that his freedom of action was restricted in a significant way.

Drake v. State, 441 So.2d 1079,1081 (Fla.1983). (PA8-9) Distinguishing this case from Mathiason v. Oregon, supra, the Florida court analized the facts as follows:

[2/] Respondent contended in the Supreme Court of Florida that custody was an irrelevant issue since Miranda warnings were, in fact, given before any questioning occurred. This Court held that a defendant must be in custody before warnings are required. E.g., Oregon v. Mathiason, 429 U.S. 492 (1977), but this case involved the assertion of the right to counsel after Miranda warnings were actually given. Once the warnings were given, the issue of whether or not they were required is moot.

> Drake, on the other hand, was asked to leave his work in the middle of the day to accompany the officers to the sheriff's office. Early during the course of the questioning he admitted to smoking marijauna with Reeder after having falsely denied being with her the night of her disappearance. Detective Pondakos subsequently notified Drake's parole officer of the narcotics violation and the homicide investigation and arrested Drake the same day without allowing him to leave. Drake apparently felt concern about the course the interrogation was taking, since he requested a lawyer and refused to answer additional questions. He remained silent until asked if he would answer on tape the same questions he had already answered. Detective Pondakos did not honor his agreement. Although the detective testified that Drake was probably free to leave at the time of the interrogation, there is nothing in the record to show that this option was ever made clear to Drake. On the contrary, although Detective Pondakos testified that he did not want to use the parole violation "as a tool to keep him there," the fact that Drake had told Pondakos of the narcotics violation is a factor bearing on Drake's state of mind at the time he gave the statement.
>
> The station-house setting of an interrogation does not automatically transform an otherwise noncustodial interrogation into a custodial interrogation. Mathiason. Yet, an interrogation at a station house at the request of the police is inherently more coercive than an interrogation in another less suggestive setting, and it is a factor that should be considered in evaluating the totality of the circumstances of a given case. We find that, under the circumstances as they existed at the time Drake submitted to the taped questioning, a reasonable person would have believed that his freedom of action was restricted in a significant way. Especially persuasive is the fact that Drake's request to discontinue further interrogation without his attorney went unheeded. Such a turn of events would certainly give a reasonable person a sense of confinement. (Footnotes omitted.)

Ibid. at 1081. The court's analysis is correct, and this issue was properly decided.

Petitioner's real claim is that the Florida Supreme Court's findings of fact regarding custody were contrary to Petitioner's position. However, the Florida Court's findings were amply supported by the evidence. This Court should not accept this case merely to allow a relitigation of a factual dispute.

(4) Retroactive Application Of Edwards v. Arizona.

This Court's decision in Solem v. Stumes, __U.S.__, 34 Cr.L. 3089 (1984) does not resolve the retroactivity issue raised by Petitioner. In Solem, this Court held that Edwards v. Arizona, 451 U.S. 477 (1981) is not to be retroactively applied in collateral review of final convictions. Such an application is not at issue in this case.

Respondent has been tried twice. His first conviction was before the Edwards decision. On appeal, the Supreme Court of Florida reversed Respondent's conviction because of improperly admitted evidence of collateral crimes. Drake v. State, 400 So.2d 1217 (Fla.1981). (RA1-4) However, the court also noted

> Drake contends there were other errors. Since we are reversing his conviction we decline to address those arguments except to note that there appears to be a technical violation of the Miranda rule when Drake's statements to Detective Pondakos were admitted.

Ibid. at 1220. This decision was rendered only three days after this Court's decision in Edwards, and Edwards had not been argued in the appeal.

Prior to Respondent's retrial on these charges, the admissibility of the statements was again raised via a motion to suppress. The motion was based, in part, upon Edwards. The motion was denied. But, on the second appeal, the Supreme Court of Florida reversed resulting in the judgment now sought to be reviewed. Drake v. State, 441 So.2d 1079 (Fla.1983). (PA1-16) Consequently, this case falls outside the holding of Solem v. Stumes and in the category of applying a new decision to a defendant whose trial has not yet begun at the time the new decision was rendered. The nonretroactivity of Edwards should not be extended to this situation.

Although the Supreme Court of Florida relied upon Edwards v. Arizona in deciding the Miranda violation in this case, the same results would have been reached without the Edwards refinement. Not only did the detective initiate further

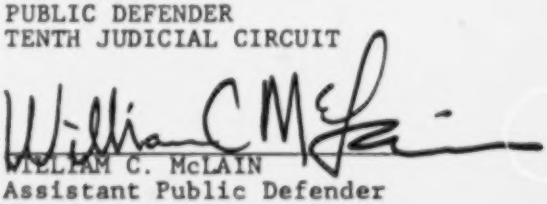
interrogation, but he also misled Respondent into submitting to questioning. Furthermore, the Florida Court recognized the violation of Miranda without the benefit of the Edwards refinement in the first appeal of this case. Drake v. State, 400 So.2d 1217,1220 (Fla.1981).

CONCLUSION

Upon the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: 
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COUNSEL FOR RESPONDENT

APPENDIX

At the inspection station, the inspection officer asked if he could further inspect the truck. One of the appellants opened the truck and the inspector stepped up on the bumper and looked under the plastic covering. He saw some burlap-covered bundles and smelled cannabis. The officer arrested Pitoscia for failure to stop for inspection and called a sheriff's deputy. The deputy sheriff found cannabis in the truck and arrested the appellants for possession.

The appellants moved to dismiss the information and to suppress evidence, contending that they were stopped on the authority of an unconstitutional statute, section 570.15, and that the warrantless search of the truck was unlawful. At the hearing on the motions, the testimony was in conflict on the issue of consent. The judge believed the officer rather than the appellants, and denied the motions.

After the denial of their motions, the appellants entered pleas of nolo contendere to the charge of possession in excess of one hundred pounds, reserving the right to appeal the denial of the motions.

[1] The appellants contend that section 570.15, Florida Statutes (1977), denies equal protection by establishing a classification having no rational basis. We hold that the distinctions drawn by the statute, providing for inspection access to trucks used in agriculture but not to passenger vehicles, and requiring trucks and vehicles pulling trailers to stop for inspection, have a rational basis. *Gluesenkamp v. State*, 391 So.2d 192 (Fla. 1980).

[2-4] The appellants contend that the motion to suppress should have been granted because the evidence in question was obtained through an illegal search. After hearing testimony, the trial judge concluded that the appellants consented to the search. The question of whether the consent was voluntary "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 92 S.Ct. 1168, 31 L.Ed.2d 230 (1973). Under ordinary circumstances the voluntariness of the consent to search must be established by preponderance of the evidence. *See McDole v. State*, 383 So.2d 653 (Fla. 1978). Since there was no evidence of coercion such as prolonged detention or a threat to obtain a search warrant, *Seuss v. State*, 370 So.2d 1203 (Fla. 1st DCA 1979); *Powell v. State*, 332 So.2d 105 (Fla. 1st DCA 1976), or repeated requests for consent, *Gonterman v. State*, 358 So.2d 595 (Fla. 1st DCA 1978); *Sarga v. State*, 322 So.2d 592 (Fla. 1st DCA 1975), the trial judge under the applicable standard of proof, could properly conclude from the officer's testimony that the appellants voluntarily consented to the search of the truck. *Dennis v. State*, 373 So.2d 47 (Fla. 1st DCA 1979).

We therefore affirm the judgments of the circuit court.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Raymond Lee DRAKE, Appellant,

v.

STATE of Florida, Appellee.

No. 54850.

Supreme Court of Florida.

May 21, 1981.

Rehearing Denied July 31, 1981.

Defendant was convicted before the Circuit Court, Pinellas County, B. J. Driver, J., of first-degree murder and he appealed. The Supreme Court held that similarity between two incidents in which defendant, during the course of sexual assaults, tied his victims' hands behind their backs, and the

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murder was not sufficiently unusual to point to defendant and was, therefore, irrelevant to prove his identity as murderer.

Reversed and remanded for new trial.

Adkins, J., dissented.

1. Criminal Law ⇐339.6

Mode of operating theory of proving identity is based on both similarity and unusual nature of factual situations being compared; mere general similarity will not render similar facts legally relevant to show identity, rather, there must be identifiable points of similarity which pervade compared factual situations.

2. Criminal Law ⇐339.6

Given sufficient similarity of factual situations in using mode of operating theory of proving identity, in order for similar facts to be relevant, points of similarity must have some special character or be so unusual as to point to defendant.

3. Criminal Law ⇐369.15

Similarity between two prior incidents in which defendant, during the course of sexual assault, bound his victims' hands behind their backs, and the crime for which defendant was charged with murder was not sufficiently unusual to point to defendant, and was therefore not relevant to prove his identity as perpetrator.

4. Criminal Law ⇐371(12)

Previous incident involving defendant was not relevant to crime charged to prove motive, i. e., that defendant raped victim then murdered her to avoid revocation of parole, where there was no evidence that defendant's reason for stopping attack in previous incident was such fear.

5. Criminal Law ⇐369.2

Fact that defendant tied victims' hands behind back in previous incidents proved only propensity and bad character and therefore was not relevant in prosecution for murder.

Jack O. Johnson, Public Defender and Paul C. Helm, Asst. Public Defender, Bartow and Bruce S. Rogow, Fort Lauderdale, of Pearson, Josefsberg & Tarre, Miami, for appellant.

Jim Smith, Atty. Gen. and James S. Purdy, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Drake appeals his conviction of first-degree murder and sentence of death. We have jurisdiction[1] and reverse his conviction.

Drake was charged with the murder of Odette Reeder. Late in November 1977, Drake and Reeder met by chance at a lounge in Pinellas Park. After several drinks, they left the bar together. Reeder indicated to friends that she would return shortly; her friends thought she was going outside with Drake to smoke marijuana. Neither Reeder nor Drake returned to the lounge, and none of her friends ever saw Reeder alive again.

Some six weeks later, Reeder's body was discovered in a wooded area in Oldsmar. The body was found lying on its back with a skirt covering the face and neck, a blouse beneath the body, and the hands tied behind the back with a bra. Although badly decomposed, the body exhibited eight stab wounds in the lower chest and upper abdomen. The medical examiner opined that these wounds caused Reeder's death, but she could not rule out other possibilities. The State theorized that Reeder was raped but this could not be confirmed by medical opinion because of the decomposition of the lower part of the body.

Part of the State's proof against Drake was evidence that on two prior occasions he had sexually assaulted two different women and had, during the course of those assaults, bound his victims' hands behind their backs.

The first incident occurred twenty months before Reeder's death. Drake had met K.T. at a lounge and offered her mor-

1. Art. V, § 3(b)(1), Fla.Const.

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phine. Thereupon they drove to Drake's apartment where he injected K.T. with the drug and then demanded payment. When she said she would pay him later, Drake stripped off her clothes, bound her hands behind her back, and violated her both vaginally and anally with a broomstick and a bottle. Then, "to give [her] a good rush," Drake choked her until she passed out. When she regained consciousness he choked her again, but this time K.T. only pretended to faint. Drake would not let her leave, and she had to make her escape as Drake slept.

The second incident occurred just two months before the Reeder homicide. On this occasion a girl that Drake had been dating, one P.B., and Drake's male roommate returned to Drake's apartment after spending the evening drinking. After a while P.B. undressed and went into the bathroom. When she returned to the bedroom, Drake was alone in the room where his roommate had been. Angry at the thought that she had engaged in sexual activity with his roommate, Drake threw P.B. on the bed, tied her hands behind her, struck her several times in the abdomen, and eventually attempted intercourse.

Williams v. State[2] holds that evidence of similar facts is admissible for any purpose if relevant to any material issue, other than propensity or bad character, even though such evidence points to the commission of another crime. The material issue to be resolved by the similar facts evidence in the present case is identity, which the State sought to prove by showing Drake's mode of operating.

[1–3] The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant. The only similarity between the two incidents introduced at trial and Reeder's murder is the tying of the hands behind the victims' backs and that both had left a bar with the defendant. There are many dissimilarities, not the least of which is that the collateral incidents involved only sexual assaults while the instant case involved murder with little, if any, evidence of sexual abuse. Even assuming some similarity, the similar facts offered would still fail the unusual branch of the test. Binding of the hands occurs in many crimes involving many different criminal defendants.[3] This binding is not sufficiently unusual to point to the defendant in this case, and it is, therefore, irrelevant to prove identity.

[4, 5] As an alternate ground for admission of the P.B. incident, the State argues that incident relevant to prove motive for the murder, that Drake raped Reeder and then killed her to avoid revocation of his parole.[4] Under the State's theory, a similar fear caused Drake's failure to complete his sexual attack on P.B., and the P.B. incident would demonstrate that Drake had a pervasive fear of revocation. This argument is not persuasive, especially in light of the fact that there is no evidence that his reason for stopping the attack on P.B. was such a fear. No other basis for relevancy has been offered to this Court, nor can we fathom any basis ourselves. Purely and simply, the similar facts evidence in this case tends to prove only two things—propensity and bad character.

Having considered the collateral facts testimony and its potential impact on any jury hearing the details of Drake's prior

2. 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

3. This Court heard oral argument on a case involving a similar binding of the hands on the very morning it heard Drake's case.

4. At the time Drake was on parole for the sexual battery of K.T.

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acts, we find that the erroneous admission of this similar facts evidence requires reversal of Drake's murder conviction. We do not accept appellant's contention, however, that, absent the similar facts evidence, there is insufficient evidence to sustain a conviction of murder. We must therefore order a new trial.

Drake contends there were other errors. Since we are reversing his conviction we decline to address those arguments except to note that there appears to be a technical violation of the *Miranda* rule when Drake's statements to Detective Pondakos were admitted.

We reverse Drake's first-degree murder conviction and remand the cause for a new trial.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

ADKINS, J., dissents.

THE FLORIDA BAR, Complainant,

v.

Benny R. S. HARRIS, Respondent.

No. 59184.

Supreme Court of Florida.

July 9, 1981.

Disciplinary proceeding was brought. The Supreme Court held that continuing and irresponsible pattern of conversion of clients' trust funds to attorney's own use, failure to account for clients' trust funds, and failure to maintain trust records warrants disbarment.

Order accordingly.

Attorney and Client ⇐58

Continuing and irresponsible pattern of conversion of clients' trust funds to attorney's own use, failure to account for clients' trust funds, and failure to maintain trust records warrants disbarment.

David G. McGunegle, Branch Staff Counsel, Orlando, and John A. Boggs, Asst. Staff Counsel, Tallahassee, for complainant.

E. G. Musleh, Ocala, for respondent.

PER CURIAM.

This disciplinary proceeding by The Florida Bar against Benny R. S. Harris, is before us on a petition for review of the report of the referee. The referee's report and record have been filed with this Court pursuant to Fla.Bar Integr.Rule, article XI, Rule 11.06(9)(b). We have jurisdiction. Art. V, § 15, Fla.Const.

The referee's findings of fact are as follows:

A. *(OSA79C03)*

1. Respondent was a member of The Florida Bar at the time pertinent to the matters alleged in the Complaint filed in this proceeding.

2. Respondent maintained two trust accounts (one in Gainesville and one in Ocala, Florida) from November, 1977 until some time in 1979. During that period of time he wrote checks on said trust accounts when there were insufficient funds in the account or accounts to cover the amount of the checks. Respondent, according to a Bar Audit conducted January, 1980, overdrew the Ocala trust account 51 times. The trust account records were not kept in accordance with appropriate rules governing trust accounts, and trust funds belong to clients were co-mingled with other clients' funds and with personal funds of Respondent.

3. Respondent executed FY 1978 and 1978 "Dues Statement" indicating he had read the appropriate rules governing

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Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Pinellas County, Florida

WHEREAS, in that certain cause filed in this Court styled:

RAYMOND LEE DRAKE vs. STATE OF FLORIDA

Case No. 62,185

Your Case No. CRC78-875CFANO

The attached opinion was rendered on October 27, 1983,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Alderman

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 22nd day of February, 1984.

Clerk of the Supreme Court of Florida.

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KARLEEN F. DeBLAKER
CLERK OF THE CIRCUIT COURT - PINELLAS COUNTY, FLORIDA

5100 144TH AVE NORTH
CLEARWATER, FLORIDA 33520
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CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

CRIMINAL DIVISION: C 03/06/84

STATE OF FLORIDA VS DRAKE, RAYMOND LEE 00019190

Cases: 78-00875-CF MURDER IN THE FIRST DEGREE

FILED
MAR 6 1984
KARLEEN F. DeBLAKER
CLERK CIRCUIT COURT
Deputy Clerk

Notice of TRIAL

The above numbered case(s) is hereby set at 09:00 A.M. on

TUESDAY, APRIL 10, 1984 at COURTROOM C, CRIMINAL COURTS, 5100 144TH AVE N CLEARWATER, FLORIDA.

All interested parties listed below are hereby notified of said TRIAL date.

KARLEEN F. DeBLAKER
Clerk of the Circuit Court

By Ruby Brunson
DEPUTY CLERK

cc: STATE ATTORNEY: KING, C MARIE
JAMX

Received By

APR 03 1984

Appellate Division
Public Defenders Office

PATRICK D DOHERTY
619 TURNER STREET
CLEARWATER FL 33516

DEFN ATTY

STATE OF FLORIDA - PINELLAS COUNTY
I hereby certify that the foregoing is a true copy as the same appears among the files and records of this court.
This 3rd day of April, 1984
KARLEEN F. DeBLAKER
Clerk of Circuit Court
By: Molly L. Henderson
Deputy Clerk

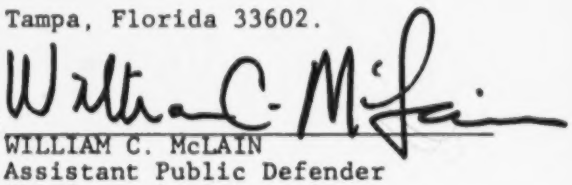
AG

CF-8 DEFENDANT MUST APPEAR. A WARRANT FOR THE DEFENDANT'S ARREST WILL BE ISSUED IF HE OR SHE FAILS TO APPEAR.

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for RAYMOND LEE DRAKE, the Respondent, hereby certify that on April 11, 1984, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Florida Supreme Court on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to WILLIAM E. TAYLOR, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Case No. 83-1519

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

vs.

RAYMOND LEE DRAKE,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, RAYMOND LEE DRAKE, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. In support of this motion, Respondent states:

1. That he was convicted of first degree murder in the Circuit Court of Pinellas County, Florida.

2. That he received a sentence of death.

3. That he appealed to the Supreme Court of Florida and that court reversed his conviction for a new trial in an opinion reported at 441 So.2d 1079.

4. That he is presently incarcerated in the Pinellas County jail awaiting his new trial.

5. That the State of Florida has filed a Petition for Writ of Certiorari asking this Court to review the Supreme Court of Florida's judgment reversing Respondent's conviction.

6. That he is entitled to respond to the Petition for Writ of Certiorari pursuant to Rule 22.

7. That he has been represented throughout his state court trials and appeals by volunteer or appointed counsel.

8. That his affidavit in support of this motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: William C. McLain

WILLIAM C. McLAIN
Assistant Public Defender
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COUNSEL FOR APPELLANT

Member Of The Bar Of The United States Supreme Court

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

vs.

RAYMOND LEE DRAKE,

Respondent.

AFFIDAVIT IN SUPPORT OF RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

I, RAYMOND LEE DRAKE, being first duly sworn, depose and say that I am the Respondent in the above-styled case; that in support of my motion to proceed on my Brief in Opposition without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer._____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. seven years ago but don't recall for whom

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No__X__

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months._____

_____

_____

3. Do you own any cash or checking or savings account? Yes____ No__X__

a. If the answer is yes, state the total value of the items owned._____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No__X__

a. If the answer is yes, describe the property and state its approximate value._____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons._____

NONE

_____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Raymond L. Drake

Respondent - Raymond Lee Drake

Subscribed and sworn to before me this 29th day of March, 1982.

Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
BONDED THRU GENERAL INSURANCE UND.
MY COMMISSION EXPIRES APR 28 1984

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for RAYMOND LEE DRAKE, the Respondent, hereby certify that on April 11, 1984, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed In Forma Pauperis with attached Affidavit of Insolvency on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to WILLIAM E. TAYLOR, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: William C McLain

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals